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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 109.

CITY OF YONKERS and JOHN W. TOOLEY, JR., as President
of Committee of Yonkers Commuters, etc., *Appellants*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION and THE NEW YORK CENTRAL RAILROAD
COMPANY.

**MOTION TO FURTHER ENLARGE TIME FOR
ISSUANCE OF MANDATE.**

THOMAS P. HEALY,

HAROLD H. McLEAN,

*Attorneys for The New York
Central Railroad Company.*

Supreme Court of the United States

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of Committee of Yonkers Commuters, etc., *Appellants*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION and THE NEW YORK CENTRAL RAILROAD
COMPANY.

MOTION TO FURTHER ENLARGE TIME FOR ISSUANCE OF MANDATE.

Now comes The New York Central Railroad Company, appellee in the above entitled cause, and respectfully moves that the time for the issuance of the mandate be further enlarged from March 1 until March 30, 1944, for the following reasons:

1. In our motion of January 18, 1944, praying that the Court enlarge the time for the issuance of mandate until March 1, 1944, it was pointed out that shortly after the rendition of this Court's opinion on January 3, 1944, the Interstate Commerce Commission, on its own motion, reopened the proceeding for rehearing and reconsideration and assigned the proceeding for further hearing on Janu-

ary 24, 1944; that it seemed evident that the Commission contemplated an early decision following rehearing; that if the mandate of this Court were issued 25 days after its judgment, or on January 28, 1944, and the court below should promptly issue its injunction setting aside the certificate of the Commission, your movant would be compelled to restore service on the branch, with the probability that such restored service would be temporary only; that under these circumstances the present status should be maintained until the Commission had an opportunity to act; that if the Commission should find upon the enlarged record containing up-to-date evidence that the abandonment would not be consistent with the public convenience and necessity, service could then be restored on a permanent basis; that a temporary restoration would not be in the public interest.

2. By order dated January 31, 1944, this Court granted said motion, and enlarged the time for the issuance of the mandate until March 1, 1944.

3. Rehearing was held by the Interstate Commerce Commission on January 24 and 25, 1944, and within ten days thereafter briefs were submitted by the parties.

4. On February 25, 1944, the Commission issued its report on rehearing and reconsideration and found, upon the enlarged record then before it, that the Yonkers branch is not an interurban electric railway within the contemplation of paragraph (22) of section 1 of the Interstate Commerce Act but is an electrically operated branch of the New York Central Railroad, and is operated as a part of its general steam system, and that it is, therefore, subject to the authority of the Commission under paragraphs (18) to (20) of section 1. The Commission made other jurisdictional findings. It further found, after full consideration of detailed evidence bearing on the needs of the public, that present and future public convenience and necessity permit abandonment of the branch. The Commission issued with

its report a certificate that the present and future public convenience and necessity permit the abandonment of the branch. A certified copy of the report and certificate is attached hereto as Exhibit A.

5. The certificate provides that it shall take effect and be in force from and after 30 days from February 28, 1944, or on March 30, 1944. Because the certificate will not take effect except after 30 days' notice, or on March 30, 1944, it is apparent that if the mandate of this Court be issued on March 1st and the court below makes its injunction effective promptly, a temporary restoration of service on the branch will be necessary. Your movant is still confronted with a severe man-power shortage and a shortage of passenger coaches needed for the long-distance transportation of civilian and military passengers. In view of these circumstances and of the findings in the Commission's report on rehearing and reconsideration, it is submitted that a short temporary restoration of service on the Yonkers branch would not be in the public interest.

WHEREFORE, the New York Central Railroad Company prays that the time for issuance of the mandate of this Court be further enlarged from March 1 until March 30, 1944.

Respectfully submitted,

THE NEW YORK CENTRAL RAILROAD COMPANY,

By THOMAS P. HEALY,

HAROLD H. McLEAN,

Its Attorneys.

Dated, February 29, 1944.

EXHIBIT A.**INTERSTATE COMMERCE COMMISSION****WASHINGTON**

I, W. P. BARTEL, Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached are true copies of the following:

Notice of the Commission dated February 28, 1944;
and

Report and certificate of the Commission filed and entered February 25, 1944,

in Finance Docket No. 13914, New York Central Railroad Company Abandonment, the originals of which are now on file and of record in the office of said Commission.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Commission this 28th day of February, A. D. 1944.

W. P. BARTEL,
*Secretary of the Interstate
Commerce Commission.*

(SEAL)

INTERSTATE COMMERCE COMMISSION

February 28, 1944.

NOTICE

Finance Docket No. 13914

NEW YORK CENTRAL RAILROAD COMPANY ABANDONMENT

The decision of the Commission, dated February 25, 1944, in the above-entitled proceeding, will be printed in full in the permanent series of Interstate Commerce Commission reports.

Accordingly, the note at the top of page 1 of said decision should be disregarded.

W. P. BARTEL,
Secretary.

This report will not be printed in full in the permanent series of Interstate Commerce Commission reports.

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 13914.

NEW YORK CENTRAL RAILROAD COMPANY ABANDONMENT.

Submitted February 4, 1944. Decided February 25, 1944.

Certificate issued permitting abandonment by the New York Central Railroad Company of a branch line of railroad in Bronx and Westchester counties, N. Y.
Previous report, I. C. C.

Harold H. McLean, for applicant.

Francis J. Bloustein for the City of New York, N. Y.

Philip Halpern and *Lawrence J. Olmstead* for Public Service Commission of the State of New York.

John J. Broderick for City of Yonkers, N. Y.

Horace M. Gray for Committee of Yonkers Commuters.

J. G. Luhrsen, *Willard H. McEwen*, *M. M. Moran*, *Charles Serhey*, *F. J. McGuire*, and *W. O. Cooney* for employees.

REPORT OF THE COMMISSION ON REHEARING AND RECONSIDERATION BY THE COMMISSION:

The New York Central Railroad Company, hereinafter called applicant, on August 20, 1942, applied for a certificate under section 1(18)-(20) of the Interstate Commerce Act authorizing it to abandon its Yonkers branch extending from Van Cortlandt Park Junction, New York, N. Y., to Getty Square, Yonkers, N. Y., 3.1 miles.

Hearing was held November 12, 1942, at which the Public Service Commission of New York, the City of Yonkers and a committee of Yonkers commuters appeared as protestants. The City of New York appeared in support of the application. An examiner's proposed report was served, to

which protestants filed exceptions, followed by oral argument before Division 4.

On March 20, 1943, Division 4 issued a report finding that public convenience and necessity permitted the abandonment, and, with the report, issued an appropriate certificate.

Petitions for rehearing were filed by protestants, in which, for the first time, they contended that the branch is an electric interurban railroad not operated as a part of a general steam railroad system of transportation, and that under section 1(22) we are without authority to permit the abandonment. By order of May 10, 1943, we denied the petitions.

A suit was filed to set aside the certificate. The District Court sustained the validity of the certificate and denied the relief sought. 50 F. Sup. 497. On June 30, 1943, applicant discontinued all train service on the branch but has kept the rails and other appurtenances intact. Upon appeal, the Supreme Court held that the certificate should have been set aside because of the absence of requisite jurisdictional findings, and reversed the judgment. *City of Yonkers v. United States*, U. S. , decided January 3, 1944.

By order of January 12, 1944, we reopened the proceeding upon our own motion for rehearing and reconsideration. Further hearing was held January 24, 1944, and substantial additional evidence was presented. Briefs were submitted within the ten-day period specified in our order.

STATUS OF YONKERS BRANCH.

Protestants contend that the application should be dismissed for lack of jurisdiction on the ground that the branch is an electric interurban railway within the exemption of section 1(22). They introduced no evidence in support of this contention. Applicant submitted additional evidence directed to a showing that the branch is not an interurban electric railway and that it is operated as a part of applicant's system. Section 1(22) provides:

The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or in-

terurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

It will be noted that this paragraph does not exempt all street, suburban or interurban electric railways, but only those which are not operated as a part or parts of a general steam railroad system of transportation. By these provisions, as we interpret them, Congress did not intend to exempt from the construction, extension, and abandonment provisions of section 1 any part of the system of a general steam railroad subject to the Act. Congress knew that many parts of steam railroads were then operated electrically and that there was a prospect of further electrification of such railroads. It intended to exercise control over all parts of such lines, whether operated by steam or by electric power.

An electric railway, not operated as a part of a general steam railroad system, engaged in transportation between urban communities, and therefore literally an "interurban electric railway," may or may not be exempt under paragraph 22 depending upon many factors, chiefly whether its operations are similar to those performed by commercial steam railroads. Several of such railways have been found to be exempt under paragraph 22. Cf. *Proposed Abandonment by Lewiston & Youngstown Frontier Ry. Co.*, 124 I. C. C. 219. Other such railways have been found not to be exempt. See *Construction by Piedmont & Northern Ry.*, 138 I. C. C. 363, in which our findings were sustained by the Supreme Court in *Piedmont & N. Ry. v. Interstate Commerce Commission*, 286 U. S. 299. As pointed out in our annual report for 1928, p. 80, great difficulty has been experienced in the construction of the exclusion clauses of the Act, including that in section 1(22), particularly in determining the roads properly classifiable as interurban-electric railways. If, however, as in the present case, it is claimed that the track involved, though electrically operated, is a branch line of a railroad operated for the most part by steam, and is operated as a part of a general steam system, we are relieved of the necessity of determining whether the branch, if it were operated independently of a steam system, would be properly classifiable as an interurban electric, and need only determine whether it is operated as a part of a general steam system.

Applicant is a common carrier by railroad engaged in the transportation of passengers and property in interstate and foreign commerce, and also in intrastate commerce. Its lines extend from New York, N. Y., and Boston, Mass., to Chicago, Ill., and numerous other points in 11 States and 2 provinces in Canada. It is subject to the Interstate Commerce Act, part I.

Its entire system, comprising 16,187 miles of main track and 8,187 miles of other track, is operated by steam, except in two locations, Cleveland, Ohio, and New York and vicinity, where some of its operations are conducted by electric power. It operates 3,198 steam locomotives and 146 electric locomotives.

Applicant's Hudson Division, which extends from New York to Albany and is part of the main line to Chicago, is electrically operated between Grand Central Station and Harmon, N. Y., 33 miles. Through express trains, as well as local commutation trains to and from points north of Harmon, change to electric power at Harmon. The Hudson Division begins at Grand Central Station, on East 42nd Street, runs north to Mott Haven Junction at East 149th Street, then northwestwardly to a point near Sedgwick Avenue and West 161st Street, thence northerly on the east bank of the Harlem River to West 191st Street, there turns west to the Hudson and proceeds northerly on the east bank of the Hudson, through Yonkers.

East of the Hudson Division, and roughly parallel with it, is a second line of applicant, called the Harlem Division, extending from Mott Haven Junction to Chatham, N. Y., where it connects with applicant's main line from Boston to Albany. This division, which skirts the city limits of Yonkers on the east, is electrified, and is exclusively operated by electric power between Grand Central and North White Plains, 24 miles.

A third division of applicant, the Putnam, lying between and roughly paralleling the Hudson and Harlem divisions, extends northerly from Sedgwick Avenue station, at Sedgwick Avenue and West 161st Street, New York City, to a point of connection with the Harlem Division at Putnam Junction, near Brewster, N. Y. This division is equipped for electric operation between Sedgwick Avenue and Van Cortlandt Park Junction, 4.7 miles, but the only trains using these electric installations were those operating between Sedgwick Avenue and Yonkers branch points. Putnam Di-

vision main line trains operate by steam locomotives south of Van Cortlandt Park Junction as well as north thereof, using the same tracks as the electric trains south of the junction. The Yonkers branch was operated by electric power exclusively.

It is clear that although its lines are electrically operated in some localities, applicant is "a general steam railroad system of transportation" within the meaning of section 1(22).

The original evidence, as supplemented upon rehearing, shows clearly that the Yonkers branch is operated as a part of applicant's system. The branch is a part, and is operated as a part, of the Putnam Division. The tracks of the Putnam Division from Sedgwick Avenue to 191st Street, about $2\frac{1}{2}$ miles, are immediately adjacent to those of the Hudson Division, and at two points connect therewith. Three stations along this stretch, High Bridge, at 169th Street, Morris Heights, at 177th Street, and University Heights, at 207th Street, are common to and serve both the Hudson and Putnam divisions. While at 191st Street the Hudson Division turns west, the Putnam proceeds northerly, passing through Van Cortlandt Park (a large public park of the City of New York extending from 240th Street to the northern city limits, about 2 miles). It then enters and passes through the city of Yonkers, thence northerly to Putnam Junction. In Yonkers the Putnam and Hudson divisions are only about a mile apart and less than 2 miles there separate the Putnam and Harlem divisions.

The Yonkers branch joins the main line of the Putnam Division at a point in Van Cortlandt Park opposite West 250th Street, called, for convenience, Van Cortlandt Park Junction. The branch proceeds from this junction in a northwestwardly direction for 1.4 miles in Van Cortlandt Park to the city limits, thence for 1.7 miles through the southern portion of the city of Yonkers to Getty Square station, where it comes to a dead end. At Getty Square the branch is 0.3 mile from the Hudson Division and about 0.7 mile from the Putnam Division main line. The Branch does not connect with the line of any railroad other than applicant's, nor does it connect elsewhere than at Van Cortlandt Park Junction with any other line of applicant.

No freight traffic has been handled over the branch for many years; no industries are dependent on it for such service. Nor does it handle mail, express or milk traffic. Its

traffic is exclusively passenger, principally commuter travel to Grand Central Station.

For many years prior to 1926, the Yonkers branch was operated by steam. On the latter date it was electrified, the third rail system being installed, and, at the same time, the Putnam Division below Van Cortlandt Park Junction was similarly equipped, permitting operation of electric trains between Getty Square and Sedgwick Avenue.

Train service on the branch prior to its discontinuance on June 30, 1943, consisted of 34 trains (17 each way) daily, with no service on Sundays, consisting of from two to four multiple-unit cars. These trains operated between Getty Square and Sedgwick Avenue, about 8 miles, running on the Yonkers branch north of Van Cortlandt Park Junction and on the Putnam main line south thereof. This was the only train service on the branch. There was no strictly local train service between stations on the branch itself. Most of these trains stopped at all intermediate stations, namely, Park Hill, Lowerre, Caryl, Van Cortlandt (in Van Cortlandt Park opposite West 242nd Street, about $\frac{1}{4}$ mile south of Van Cortlandt Park Junction), Kings Bridge (230th Street), University Heights (207th Street), Morris Heights (177th Street), and High Bridge (169th Street).

Due to the congested condition of the main line south of Mott Haven, and other operating difficulties, Putnam Division trains do not run through to Grand Central Station, but terminate at Sedgwick Avenue. Putnam Division and Yonkers branch passengers going to Grand Central must transfer to Hudson Division trains at either High Bridge or University Heights. The train schedules of the Hudson Division and those governing the Getty Square-Sedgwick Avenue trains and Putnam Division main line trains are arranged so that close connections may be made at the transfer points.

There are no separate operations conducted exclusively on the branch. The only trains operated on the branch were also operated over another part of applicant's system—the Putnam Division south of Van Cortlandt Park Junction. A majority of the passengers riding on Yonkers branch trains begin or end their trips at Grand Central Station, transferring to or from Hudson Division trains. Through tickets for such trips are issued by applicant, at rates named in its published tariffs. Time tables of trains operating on the branch are published by applicant, and

these tables show also the schedules of connecting Hudson Division trains at High Bridge and University Heights operating to and from Grand Central. All revenues accruing from the operation of the branch are collected by applicant; all expenses of its operation are paid by applicant.

The track now known as applicant's Yonkers branch, constructed by an independent company in 1888 and operated by that company and the New York & Putnam Railroad Company for several years, was leased to applicant's predecessor, the New York Central & Hudson River Railroad Company, on February 1, 1894. The latter company conducted steam operations over the branch as a part of its general system until April 29, 1914, when that company was merged with applicant. On March 7, 1913, the New York & Putnam was merged with applicant's predecessor, and thereafter ceased to have separate corporate identity. The branch has been operated by applicant since April 29, 1914, as a part of its Putnam Division which, in turn, is operated as a part of its railroad system.

All trainmen operating Yonkers branch trains, all agents at stations on the branch and all other employees connected with the operation of the branch are employees of applicant. The branch has no separate supervising officers such as superintendents, train-masters, or the like. The superintendent in charge of operations on applicant's "electric division" in the New York District has authority over the Grand Central Terminal, that part of the Hudson Division which is electrified, that part of the Harlem Division which is electrified, that part of the Putnam Division which is electrified, and the Yonkers branch.

The tracks of the Yonkers branch are maintained under the general supervision of applicant's maintenance-of-way engineer having authority over applicant's lines at Buffalo and east thereof, and under the immediate supervision of a division engineer charged with the maintenance of certain other lines in the New York district.

No separate accounts are maintained for the branch. The station agents at points on the branch make reports to the system auditor of passengers accounts in the same manner as station agents at other points on the system, and the expenses are reported through divisional offices to the departmental accountants who in turn report them to the applicant's auditor of disbursements at New York. To determine the results of operation of the branch, a separation

must necessarily be made of general system accounts. No separate reports are made to this Commission or to the New York Commission respecting the branch. The results of operation of the branch are included in the figures for the system as a whole in the reports to this Commission. The annual report of applicant to this Commission for the year 1942 and for many previous years shows the branch as a part of the system owned and operated by applicant.

In view of these facts, and many other supporting facts of record, we find that the Yonkers branch is not a street, suburban or interurban electric railway within the contemplation of section 1(22), but is an electrically operated branch of a general steam railroad system, and that, even though there were doubt concerning its status as an electric railway, it would yet not be within the exemption of section 1(22), since it is operated as a part of applicant's general steam railroad system of transportation. Compare *Proposed Control of Sacramento Northern by W. P. R. R.*, 71 I. C. C. 653 and 79 I. C. C. 782, *New York, Westchester & Boston Ry. Co.*, 218 I. C. C. 253, and *Interurban Electric Railway Company*, 227 I. C. C. 589; see also *Texas & Pac. Ry. Co. v. Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 277. We further find that the application for a certificate authorizing abandonment of this branch is subject to our authority under paragraphs (18) to (20), inclusive, of section 1 of the act, and that the branch is not within the exemptions of paragraph (22).

PUBLIC CONVENIENCE AND NECESSITY.

The portion of the branch in New York City is entirely within Van Cortlandt Park, which has no resident population. The branch serves a relatively small residential area in the southern part of Yonkers. The only stations on the branch are Caryl, Lowerre, Park Hill, and Getty Square in Yonkers. There is no station at Van Cortlandt Park Junction, nor elsewhere on the branch in Van Cortlandt Park.

Patronage on the Yonkers branch declined steadily during the last 15 years of its operation. As found in the earlier report, the volume of business in 1941 and early in 1942 was only about 25 per cent of that 12 years previously. In 1926, when the branch was electrified, 71 trains were operated on week days. Because of the gradual reduction of the number of passengers using the branch, train operations were progressively reduced between 1926 and Septem-

ber 1938 to 36 trains, and then a reduction was made to 34 trains, 17 northbound and 17 southbound.

Actual train checks made in May 1941, May 1942, June 1942, and October 1942, showed that the total number of passengers carried on Yonkers branch trains averaged 643 southbound and 593 northbound. Nearly two-thirds of these used commutation tickets: 453 southbound, 433 northbound. Most of these passengers commuted between Caryl or Lowerre and Grand Central. The monthly commutation fare between these stations, about 14 miles, is \$8.53.¹ It is obvious that this small number of passengers paying these fares would not produce sufficient revenue to support the branch. The total system revenues received from the transportation of all passengers traveling locally on the branch and between points on the branch and Grand Central and other points on applicant's system, for example, \$47,610 in 1942, was only slightly more than the taxes assessed against the branch, for example, \$34,557, paid in 1942.

The original report showed the aggregate number of passengers carried on the branch during 1940 and 1941 and the first six months of 1942. Upon rehearing similar data were furnished for the year 1942 and the six months of operation in 1943. This evidence indicates that there was no increase in patronage on the branch subsequent to the period covered by the original record, but that on the contrary there was a slight decrease. This is shown by comparing the number carried during the six months of operation in 1943 with the corresponding period of the preceding year. In the six months of 1943 the number was 160,306, or 1,295 less than the 161,601 carried during the similar period of 1942. The revenue was about the same, \$24,494 in the first six months of 1942 and \$24,545, or \$51 more, in the corresponding period of 1943. The number carried during

¹ Other fares are as follows: Between Grand Central and Caryl, one-way fare 28 cents, round trip 56 cents, 12-trip fare \$3, 26-trip fare \$6.10. Between Grand Central and Lowerre, 33 cents, 66 cents, \$3.15 and \$6.10, respectively. Between Grand Central and Park Hill, 33 cents, 66 cents, \$3.40 and \$6.60, respectively; monthly commutation fare \$8.94. Between Grand Central and Getty Square, 33 cents, 66 cents, \$3.60 and \$7.05, respectively; monthly commutation fare \$9.29. In addition, 46-trip monthly school fares are maintained between these points, as follows: between Grand Central and Caryl, \$6.15, Lowerre, \$6.15, Park Hill, \$6.47, Getty Square, \$6.74.

the year 1942 was 314,502 (averaging about 502 daily in each direction). In 1940, 335,909 were carried, in 1941, 300,205. The figure for 1942 reflects a slight increase over 1941, but a marked decline from 1940.

Of the 314,502 carried in 1942, 6,674 were local passenger between stations on the branch; the others were "interline" passengers, going to other points on applicant's system, including 196,042 who traveled between stations on the branch and High Bridge or University Heights and there transferred to or from Hudson Division trains en route to or from Grand Central.

The earlier report, after setting forth the supporting figures, found that "the estimated annual loss from operation of the branch is \$56,941, on the basis of the average revenues for the years 1940 and 1941, including rents and the small amounts of income from vending machines." Evidence submitted at the rehearing, giving corresponding figures for the year 1942 and the first six months of 1943, shows that the estimated annual loss from operation of the branch, on the basis of the average revenues for 1940, 1941, 1942, and the first six months of 1943, is \$60,155, or \$3,214 more than previously found. The difference between the two figures is attributable, in the computation of the later one, to the use of 1942 costs for labor, and to the use of the 51½ years prior to July 1, 1943, in computing maintenance of way and structure expenses instead of on the 7¼-year period from 1933 to 1937, 1940, and 1941, and the first three months of 1942, used in the earlier computation.

In determining the financial results of the operation of the branch, the branch was credited with all the revenues earned on the hauling of passengers locally between points on the branch and also with the entire revenues earned on the hauling of passengers between each of the stations on the branch and Grand Central Station and all other points of destination. The revenues were ascertained from ticket sales and conductors' cash sales, plus a proper proportion of revenue from sales of "optional" tickets purchased at points not on the branch, under which, generally speaking, the purchasers may elect to travel on either the Hudson Division or the Yonkers branch or the Putnam main line to and from points on those lines for distances approximately equal to the distances north of the Grand Central Terminal as far as Getty Square. The total revenues were: Local, including negligible amounts from vend-

ing machines, \$715 in 1940, \$720 in 1941, \$701 in 1942 and \$532 in 1943 (six months); from passengers traveling to and from points beyond the branch, \$48,888 in 1940, \$44,717 in 1941, \$46,936 in 1942, and \$24,022 in 1943 (six months), totaling \$49,603, \$45,437, \$47,637, and \$24,554, respectively—an average of \$47,780 annually for the 3½-year period, to which average should be added, in order to determine the total system revenue accruing from the operation of the branch, \$2,100 annual rentals received from leases of space, making an aggregate of \$49,880. No other revenue attributable to the operation of the branch was received.

Expenses assigned to the performance of this transportation are estimated at \$110,035 annually. There are included in these expenses only the following item: Out-of-pocket expense of operating the branch, \$44,957; taxes assessed on the right-of-way and other properties of the branch by the cities of New York and Yonkers, based on the 1944 rates and assessed valuations, \$21,510 in Yonkers and \$11,526 in New York City, totaling \$33,036, minus \$676 paid by lessees, or \$32,360; out-of-pocket expense of transporting the passengers on the Putnam Division south of Van Cortlandt Park Junction, \$32,718; total, \$110,035. In computing these costs nothing was included for overhead expense, or depreciation. The difference between these expenses and the total revenue of \$49,880 represents the annual loss of \$60,155 from the operation of the branch.

The out-of-pocket expense of \$44,957 incurred in operating the branch is the total of the following items: Maintenance of way and structures, based on actual expenditures during the 5½-year period prior to July 1, 1943, \$17,908; maintenance of equipment, i.e., repairs to multiple unit cars, based on cost per car mile, \$2,924; crew wages, based on a mileage proportion, or 40 per cent of the wages paid for train operation between Sedgwick Avenue and Getty Square, \$8,682; train supplies and expenses, based on cost per car mile, \$2,010; station employees, actual, \$9,309; station expenses, actual, \$430; power expense, based on cost per car mile, \$3,694. Generally the expenses are based on 1942 costs, except, as above indicated, those relating to maintenance of way and structures.

The \$32,718 shown as the cost of transporting branch passengers in electric operations on the Putnam main line south of Van Cortlandt Park Junction is divided as follows: Maintenance of way \$6,751; maintenance of equip-

ment, \$4,387; crew wages, \$13,023; train supplies and expenses, \$3,016; power expense, \$5,541. In computing these costs no consideration was given to expenses for steam operations on this part of the Putnam Division which have been maintained since the discontinuance of electric operations between Getty Square and Sedgwick Avenue and which will continue in the future.

No expense is included in the above computations for transporting in Hudson Division trains between High Bridge or University Heights and Grand Central, 8 miles and 9.5 miles, respectively, the Yonkers branch passengers who transferred at High Bridge or University Heights to or from Yonkers branch trains. This expense was omitted on the theory that the full cost of operating Hudson Division trains would continue even though they carried no Yonkers branch passengers. But it is obvious that space had to be provided on those trains for the Yonkers branch passengers, and that duplicate service was provided for all Yonkers branch passengers who transferred to or from Hudson Division trains, averaging 62 or 63 per cent of the total Yonkers branch passengers. In other words, northbound, space had to be provided for these passengers in Hudson Division trains from Grand Central to High Bridge or University Heights. These trains continued on to Harmon or Peekskill, at no less expense than if these passengers had continued on. Service also had to be provided for them in Yonkers branch trains from High Bridge or University Heights to stations on the branch in Yonkers. Similarly, southbound, space had to be provided in Hudson Division trains, which started at Peekskill or Harmon, for the Yonkers branch passenger carried on Yonkers branch trains to High Bridge or University Heights and there transferring to Hudson Division trains.

On the foregoing bases, the operation of the branch resulted in system losses of \$60,155 annually. These losses would be saved by abandonment of the branch. Applicant has added, as additional savings, \$14,991, representing interest at 5 per cent annually on the net salvage value of the branch and equipment of \$299,823. If this interest is added to the loss of \$60,155, it would increase the estimated saving from the abandonment of the branch to \$75,146.

A study was made by the applicant to ascertain how many of the former Yonkers branch patrons continued to use applicant's lines and how much revenue was obtained

from their transportation, after discontinuance of the operation of the branch. The study was confined to ticket sales for rides between the Hudson Division Ludlow station and the Grand Central Terminal. In the first six months of 1943, Ludlow passengers increased \$1,442 over the same six months in 1942, and revenues increased \$1,471 a month. In the five months, July to November, 1943, after discontinuance of service on the branch, Ludlow passengers increased 83,777 over the same five months of 1942, and revenues increased \$3,353 monthly. The difference between the monthly increases in the five-month period and the increases in the previous six-month period of 1943 indicates the portion of the Ludlow business after June 30, 1943, attributable to the use of the Hudson Division by former patrons of the Yonkers branch, namely, 9,848 passengers and \$1,882 revenue monthly, or at the rate of 118,176 passengers a year and \$22,584 annual revenue. The suggestion is advanced by the applicant that the \$22,584 should be added to the actual annual losses incurred from the operation of the Yonkers branch to show the effect of the abandonment on its system. If this is done, the savings from the abandonment of the branch, including interest on net salvage value, are increased to \$97,730.

It is clear that on either of the bases submitted by the applicant, or any other fair method of computation, the operation of the branch has resulted in substantial losses, varying from \$57,000 to \$60,000 annually. While it is true that interest on salvage value and the retained revenue resulting from use by former branch patrons of the Hudson Division are further benefits which will accrue to applicant if the branch is abandoned, and show the additional burden upon applicant and upon interstate commerce if the operation of the branch is continued, we are of the opinion that such items cannot be considered as losses incurred in such operation. The fact, however, that there was a substantial increase in the number of passengers to and from Ludlow is relevant on the question of public convenience and necessity, as it indicates the availability of other adequate transportation facilities.

The Committee of Yonkers Commuters contends, in effect, that the actual loss of \$60,155 from the operation of the branch should be reduced to \$36,093 because if the loss had not been incurred applicant would have paid a 40 per cent Federal income tax on an equal sum, amounting to

\$24,062. But obviously the loss was actually incurred, and it cannot reasonably be considered that it was less because applicant's total income tax might have been \$24,062 less than it would have been had it not been incurred.

The Committee suggests we should require applicant to take steps to secure substantial reductions in taxes paid to New York City and the City of Yonkers, in the interest of honest, efficient and economical management. Negotiations with the taxing authorities of those cities since our first hearing resulted in a reduction of \$2,407 in Yonkers taxes, and none in the New York City taxes. There is nothing in the record to indicate that applicant could reasonably hope to force their reduction.

Applicant assumes that the area tributary to the branch is bounded on the west by a line midway between the branch and the Hudson Division and on the east by a line midway between the branch and the Putnam main line, and that, therefore, the branch serves an area of approximately 1.2 square miles, or 5.7 per cent of the total area of Yonkers, and estimates that the population served by the branch is 12,834. The Deputy Tax Commissioner of Yonkers expressed the view that the area tributary to the branch is more extensive, that it includes three wards having a total population of 38,204 in 1940. Assuming the latter figure to be right, it indicates there are a substantial number of people living in the area tributary to the branch. Yet the record shows that only a handful of them patronized the branch.

The Deputy Tax Commissioner further testified that the assessed value of the land and improvements in the area considered by him to be tributary to the branch was \$27,901,250; and a real estate broker expressed the opinion that this value would be decreased approximately 10 per cent by the abandonment of the branch. In view of the small number of Yonkers residents who used the branch, it seems unreasonable to suppose that the value of the tributary real estate would be reduced 10 per cent by the abandonment. However, as we have held in numerous cases, residents and property owners who do not furnish sufficient traffic to support a line cannot reasonably expect it to be continued in operation indefinitely at a substantial loss to the carrier, in order to preserve the value of their property.

Abandonment of the branch will not leave the City of Yonkers without adequate alternate transportation. There are a number of other routes which furnish practically the same transportation service as the branch. The Hudson and Putnam divisions afford frequent commutation service to the vicinity of Sedgwick Avenue and to Grand Central Station. There are four stations in Yonkers on the Hudson Division, Greystone, Glenwood, Yonkers, and Ludlow, at which numerous trains stop throughout the day, and furnish rapid transportation to and from Grand Central, without change of cars en-route, and make stops at intermediate points, including Marble Hill (West 225th Street), University Heights, Morris Heights, High Bridge, 138th Street, and 125th Street. Ludlow is the nearest and the most convenient Hudson Division station in Yonkers for persons living near the Yonkers branch. Ludlow is 0.6 mile from the Park Hill station, 1.1 miles from the Lowerre station and 1.6 miles from the Caryl station. Two bus lines, referred to more in detail later, operate from the vicinity of the Yonkers branch to Ludlow. Thirty-eight trains daily furnish passenger service between Ludlow and Grand Central.²

There are six stations on the Putnam Division within Yonkers: Nepera Park, Gray Oaks, Nepperhan, Bryn Mawr, Dunwoodie, and Lincoln. Ten trains, stopping at all these stations, and an eleventh stopping at Bryn Mawr and Dunwoodie, operate southbound on week days, to Sedgwick Avenue, scheduled to make close connections at High Bridge or University Heights with Hudson Division trains bound for Grand Central. Northbound, 13 trains operate on week days from Sedgwick Avenue, making close connections with Hudson Division trains from Grand Central, and all stop at the six stations in Yonkers. Most of these trains run during the morning and afternoon rush hours. Lincoln, the most convenient for persons living near the Yonkers branch, is 0.6 mile from Caryl, 0.9 mile from Lowerre, and 1.6 miles from Park Hill. A street car line from Getty

² Service on these trains is very frequent in the morning and afternoon rush hours. For example, trains leave Ludlow for Grand Central Station in the early morning hours at 6:21, 7, 7:31, 7:47, 7:57, 8:02, 8:14, 8:34, 8:50, and 9:13. Northbound trains stopping at Ludlow leave Grand Central Station at 4:17, 4:34, 5:17, 5:18, 5:19, 5:35, 5:36, 5:52, 5:54, 6:07, 6:15, 6:26, 6:40, and 7:13.

Square, Yonkers, passing close to Park Hill, Lowerre, and Caryl, runs east on McLean Avenue to the Lincoln station.

Two bus lines operate from the area adjacent to the Yonkers branch to Ludlow. One of these, the Nodine Hill, operates from the Hudson Division Yonkers station to Ludlow, over a route that passes Getty Square station, proceeds about 1.5 miles to the east, then south about an equal distance, then west on Caryl Avenue, crossing Broadway, to Ludlow, passing immediately in front of the Yonkers branch Caryl station. The other, the Park Hill, operates between the same termini over a route somewhat shorter, proceeding east past the Getty Square station to Linden Avenue, then south, then west on Radford Street, crossing Broadway, to Ludlow, passing within half a block of the Lowerre station. Most of the Yonkers branch patrons used the Caryl and Lowerre stations.

Frequent service is maintained over these routes; and the busses are scheduled to arrive at Ludlow shortly before the departures of Hudson Division trains and to leave there shortly after arrivals of the trains. On the Nodine Hill, 16 bus trips are made in the morning rush hours, with a bus arriving at Ludlow every few minutes between 6:30 and 9:32 a. m., and during the afternoon rush hours 13 trips are made from Ludlow between 4:45 and 7:09. On the Park Hill, there are 12 trips to Ludlow in the morning rush hours and 19 from that station in the afternoon rush hours.

The monthly commutation fare between Grand Central and Ludlow, 14 miles, is \$8.94, equivalent to 17 cents per ride on basis of 52 rides monthly. The bus fare is 5 cents, making the total bus-train fare 22 cents. The monthly commutation fare between either Caryl or Lowerre and Grand Central of \$8.53 is equivalent to 16.4 cents per trip on basis of 52 trips monthly, or 5.6 cents per trip cheaper than the route by bus and Ludlow Hudson Division trains. The time required for travel between Lowerre or Caryl and Grand Central, including the transfer to the Hudson Division, averaged about 40 minutes, which was only a few minutes less than the route by bus to Ludlow and the Hudson Division train.

The Park Hill line started operations in December 1937. About half of its patrons live in the area adjacent to the Yonkers branch. The Nodine Hill line was started in 1940 and was extended to Caryl Avenue in 1941. Upon the inauguration of these bus lines many passengers then patron-

izing the Yonkers branch deserted that route and began using the busses to and from Ludlow and the Hudson Division trains.

There has been no change in the routes of the Park Hill and Nodine Hill lines since the previous hearing. During the interim a "tripper" bus was added to the Nodine Hill line, making two trips during the morning rush hours to Ludlow and two trips from Ludlow during the afternoon rush hours to and from a point near the Lowerre station. A new school bus route was also established in the interim. This bus operates during the morning hours in the same vicinity as the other bus routes, taking school children off the regular routes and permitting more passengers to board the busses to and from Ludlow. Protestants claim that since the discontinuance of the Yonkers branch trains these busses have been overcrowded. This is denied by the bus company. On the whole, the bus service seems to be adequate.

Other alternative routes are provided by street cars from Yonkers to the New York subway system. Two lines of the New York subway system reach almost to the city limits of Yonkers. The Broadway subway extends to 242nd Street, within about 1.5 miles of the Yonkers city limits. The Lexington Avenue subway extends to Woodlawn, about 1.3 miles from the Yonkers city line. The Broadway subway runs southward on Broadway and Seventh Avenue to the tip of Manhattan, thence to Brooklyn. The Lexington Avenue subway runs down on the east side on Jerome and Lexington Avenues to the Battery and Brooklyn. Two street car lines from the northern part of Yonkers converge at Getty Square, and run south on Broadway to 242nd Street and beyond. Broadway in Yonkers is between applicant's Yonkers branch and its Hudson Division, closely paralleling the Yonkers branch throughout its length. During the morning and afternoon rush hours, these two car lines together maintain a 2½-minute headway. The running time from Lawrence Street and Broadway, in Yonkers, which is near Lowerre station, to 242nd Street is only 10 minutes. The previous record showed that substantially more passengers could be carried on these car lines without difficulty. The superintendent of the company expressed the view that in the event of the abandonment of the Yonkers branch, his company would be able to handle the expected increase in business. Upon rehearing, he testi-

fied there had been no change in the schedule of these cars; that their volume of business increased during the period of about a year prior to December 1, 1943, and then declined. He had no way of determining how much of the increase was attributable to the discontinuance of service on the Yonkers branch.

The McLean Avenue street car line, previously referred to as running from Getty Square and passing close to the Park Hill, Lowerre, and Caryl stations to the Lincoln station, proceeds easterly from that station for a short distance to Jerome Avenue, then south to the Lexington Avenue Woodlawn subway station.

Other alternative routes are (1) Broadway surface car and subway from Yonkers to Marble Hill station at Broadway and 225th Street, thence Hudson Division train to Grand Central, with an over-all time of 50 minutes and an aggregate fare of 24 cents; (2) Broadway surface car through to Marble Hill, thence Hudson Division train to Grand Central, this latter route being 5 cents cheaper than the former as it does not use the subway; (3) by either the Nodine Hill or Park Hill bus to Caryl Avenue or Radford Street and Broadway, thence Broadway street car line to 242nd Street, thence the Broadway subway.

The time required for these trolley-subway trips is somewhat longer than that on applicant's Yonkers branch-Hudson division trains to Grand Central, but the fare, 5 cents on the trolley and 5 cents on the subway, is much cheaper.

The record indicates that these are all practicable and feasible routes, and that they have been used frequently by Yonkers' residents. At the original hearing a number of Yonkers commuters, testifying in opposition to the proposed abandonment, compared the Yonkers branch route with various alternative routes, and stated, in most instances, that the former was more convenient for them. But in each instance it was developed that there existed one or more alternate routes which could be used. The routes employing surface cars and subways were all much cheaper, but usually the time was somewhat longer; those embracing other lines of applicant were usually about the same from the time standpoint but were somewhat more expensive. As stated in the report of division 4, in most instances, the alternate routes required from 10 to 25 minutes more time. The maximum claimed was 55 minutes.

one witness testifying that he used the Yonkers branch from Caryl to go to his place of business on Madison Avenue near 43rd Street, transferring at High Bridge to a Grand Central train, and that he made this trip in 35 minutes; that he had tried the trip northbound by subway and surface car, without specifying which ones, and that the difference in running time was 55 minutes. This testimony assumes a time of $1\frac{1}{2}$ hours to go by subway and surface car from 42nd Street in New York City to Caryl Avenue in Yonkers, whereas the subway running time from Times Square, at 42nd Street, to 242nd Street is about 37 minutes and of the Broadway trolley from 242nd Street to Caryl Avenue, about 10 minutes. A review of the record shows that the statement in the report of division 4 that the excess time, depending upon the method of travel used, was in some instances an hour or more is erroneous.

Upon rehearing it was shown that the 11 multiple unit cars used in service between Sedgwick Avenue and the Yonkers branch prior to its discontinuance were added to the pool of such cars in service in the New York district and that this permitted the release of standard steam train coaches, then employed on the electrified portion of the Harlem Division, for use elsewhere on the system where they were needed for civilian and military long-distance travel.

The Commuters Committee contends that the loss suffered by the applicant from the operation of the Yonkers branch is small when compared with the system profits, and therefore cannot be considered an undue burden on the applicant or on interstate commerce. In the period 1933-1942 the applicant's net railway operating income ranged from \$33,269,163 in 1933 to \$15,582,476 in 1938, and thereafter increased progressively to \$90,399,495 in 1942 and in the first 11 months of 1943 amounted to \$80,439,361. Its net income in these years, after payment of fixed charges ranging from \$58,369,186 in 1933 to \$48,513,499 in 1942, and \$41,712,778 in the first 11 months of 1943, were \$5,412,514, deficit, in 1933; \$7,682,335, deficit, in 1934; \$115,046 in 1935; \$8,933,175 in 1936; \$6,352,612 in 1937; \$20,154,357, deficit, in 1938; \$4,509,236 in 1939; \$11,265,084 in 1940; \$26,245,562 in 1941; \$49,082,182 in 1942; \$54,574,182 in the first 11 months of 1943.

It was shown by the City of Yonkers that the applicant's total investment, including investment in road and equip-

ment, improvements on leased property, and other investments, as of December 31, 1941, was \$1,734,816,620; that the rate of return upon that investment, after payment of all expenses and Federal and Canadian taxes, for the calendar year 1941, was about 31.3 per cent, and that the rate of return in the year 1942, on the same basis, was about 5.06 per cent. The rate of return for the 11 months of 1943, similarly computed, based on a total investment of \$1,762,964,927 and a net railway operating income of \$80,439,361 was 4.56 per cent, or at the rate of about 4.97 per cent for the year. If applicant's income is now flush, it is attributable largely to the transportation of an enormous tonnage of war materials and of a swollen passenger traffic incident to travel by rail because of war conditions. These are abnormal conditions; they cannot be expected to continue indefinitely in the future. Applicant's revenues are earned from rates and fares the general level of which is presumably reasonable, and if that general level, or if particular rates, are unreasonable, they are subject to reduction by procedure under the Interstate Commerce Act. The National Transportation Policy requires that transportation subject to the provisions of the Act shall be so regulated, as, among other things, "to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation" and "to encourage the establishment and maintenance of reasonable charges for transportation services . . ." It is contrary to the purposes of the abandonment provisions and inconsistent with the purpose of the act as a whole to require drains upon the revenue of an interstate carrier flowing from the operation of an unprofitable and unnecessary branch merely because system operations as a whole are profitable. Losses from such operation are inevitably a burden on interstate commerce, whether at the particular time the system as a whole is profitable or unprofitable.

In *Long Island R. Co. Abandonment*, 166 I. C. C. 671, authorizing the Long Island to abandon a portion of its Whitestone branch, where we discussed this question, we said, at pp. 676-677:

... Our jurisdiction was practically conceded by the representative of the civic associations, who, however, suggested that even though we consider that we have jurisdiction it should not be asserted in this instance, for the reasons that the questions involved are almost

wholly of a local character and that such losses as may occur through operation of the branch by the applicant can not possibly be considered as placing an unreasonable burden upon inter-state commerce. The evidence is to the effect that the applicant is a prosperous carrier and that it is in turn controlled by the Pennsylvania Railroad Company, which is well known to be among the strongest railroad systems of the country . . . It is true that even though we add to the applicant's transportation losses from operation of the branch the capital charge that would be imposed upon it by the proposed grade-crossing elimination, the amount involved is relatively small when compared with the financial resources and transactions of the Pennsylvania system. Nevertheless it must be recognized that the conservation of the resources of any railroad system requires cognizance of items even less substantial than those here involved. Any unnecessary burden upon the transportation system of the country is an unreasonable burden. While it is true that loss from operation of a portion of a railroad system will not in every case justify the abandonment of such operation, it is also true that circumstances may justify the abandonment of an unprofitable line notwithstanding the prosperity of the system as a whole. The circumstances of each case must govern its disposition. . . . This view, and our proposed action, are, in our opinion, fully supported by the views of the Supreme Court regarding the purposes of the statute under which we take jurisdiction, as expressed in *Colorado v. United States*, 274 U. S. 153, . . .

Our order in that proceeding was sustained by the Supreme Court in *Transit Commission v. United States*, 284 U. S. 360. See also *Oregon-W. R. & Nav. Co. Abandonment*, 175 I. C. C. 492, 494-495; *Chicago, M., St. P. & P. R. Co. Proposed Abandonment*, 162 I. C. C. 89; *Abandonment of Line by Colorado & Southern Ry.*, 72 I. C. C. 315, 320, in which our order was sustained by the Supreme Court in *Colorado v. United States*, 274 U. S. 153.

We find that the continued operation of the Yonkers branch will impose an unnecessary and undue burden upon the applicant and upon interstate commerce.

The Public Service Commission of New York and other protestants assert that we lack jurisdiction on the ground that the branch lies wholly within the State, and there is no affirmative showing that interstate commerce is transported over it, that its traffic is exclusively passenger, mostly commuter travel to Grand Central Station, and that the continued operation of the branch or its abandonment is wholly a matter of local interest.

The record is not altogether clear on the question whether the branch has transported interstate passengers. It does indicate that passengers travelling on interstate journeys may have used the branch. The stations on the branch were supplied with tickets in the same form as used at all other stations on applicant's system which could be issued for use to any point on the system, either for intrastate or interstate journeys. Tickets could be purchased at any station on the system for travel either intrastate or interstate to points on the Yonkers branch. The tariffs of applicant, published and filed with this Commission, named fares from points on the branch to other points on the system, including fares for interstate journeys to and from points in other States. While there is no evidence that passengers have purchased tickets at Yonkers branch stations for interstate journeys and have used them on Yonkers branch trains, it seems probable that many passengers, in making journeys to and from points in other States, especially those south of New York, have ridden on Yonkers branch trains at the beginning or end of their trips, transferring in New York City to and from stations of other railroads. A passenger from Yonkers to Washington, D. C., for example, could travel from Yonkers to New York City either wholly on the Hudson Division or on the Yonkers branch and then the Hudson Division, and transfer from the Grand Central Station in New York City to either the Pennsylvania or the Baltimore & Ohio Railroad.

Under the decision in *Colorado v. United States*, 271 U. S. 153, however, the leading authority in cases of this nature, we have jurisdiction to authorize abandonment, as to intrastate commerce, of an intrastate branch of a common carrier by railroad engaged also in interstate transportation subject to the provisions of the Interstate Commerce Act, where its system physically extends from one State to another, if the branch is operated at a substantial loss and its abandonment is, therefore, necessary in order to re-

move a burden on interstate commerce, and if public convenience and necessity permit of its abandonment. The fact that the continued operation of the branch in intrastate commerce would burden interstate commerce is controlling on the question of jurisdiction, and it would seem clearly to be without significance that the burden is caused by the operation of the branch exclusively for a particular kind of traffic. Compare *Texas v. Eastern Texas R. R. Co.*, 258 U. S. 204; *Abandonment by Detroit & Mackinac Ry.*, 138 I. C. C. 576, 579-580; *U. S. Feldspar Corp. v. United States*, 38 F. 2d 91 (D. C. N. D. N. Y.); *Transit Commission v. United States*, 284 U. S. 360, 368. This is recognized by the decision of the Supreme Court in the present case, which states:

The power of the Commission to control the abandonment of intrastate branches of interstate carriers stems from the power of Congress to protect interstate commerce from undue burdens or discriminations. *Colorado v. United States*, 271 U. S. 153; *Transit Commission v. United States*, 284 U. S. 360; *Parcell v. United States*, 315 U. S. 381.

The fact that the Yonkers branch has only passenger business, mostly local commuter traffic, is not of legal significance on this question of jurisdiction, for the applicable principle would not be different if the branch, instead, transported only freight traffic.

At the original hearing a witness for applicant testified to the following effect: Early in 1942 the War Production Board made an urgent demand upon applicant and other railroads to do everything possible to find places where facilities might be abandoned so as to produce scrap metal and second hand rail. The Government has been very deficient in second-hand rail for the purpose of meeting the requirements of cantonments, defense industries, storage yards and the like. Applicant made a canvas and found 15 or 20 locations where the possibility was presented, and then investigated those places to determine whether or not abandonment should be effected. The Board urged that prompt action should be taken in respect to these abandonments and expedited as much as possible with this Commission, but it did not suggest any particular abandonment. From the negotiations and discussions between the Board and officials of the applicant, it appears that the Board is

of the opinion that this particular abandonment should be carried out, that is to say, that it "should be presented to the Interstate Commerce Commission."

Counsel for the Commuters Committee contends that the presence of this testimony in the record disqualifies us to act, on the ground it indicates pressure upon us by a war agency. In this connection the same counsel refers to our annual report to Congress for 1942, in which we said, in part:

Owing to the present national demand for metals and rails which can be salvaged from abandoned railroads, carriers have been making surveys of their branch-line operations for the purpose of determining whether they are warranted in requesting permission to abandon any of them.

.

Under our cooperative plan with the War Department and the War Production Board, we notify them of applications for permission to abandon as these are filed and advise them of the status thereof. The War Department, in each case, notifies us whether it considers the line involved of military value. The War Production Board forwards to us, as information, notices of requisitions of lines of railroad, the materials in which it considers suitable for salvage purposes.

When an application is filed, even in times of war or national peril, our duty is to determine, from the evidence presented, whether "the present or future public convenience and necessity permit of such abandonment." The need of the military authorities for scrap metal and relaying rail, however urgent or vital to the winning of the war, would not alone warrant a finding that public convenience and necessity permitted a particular abandonment. It might be an element which may, and perhaps should, be considered by us, see *Confluence & O. R. Co. Abandonment*, 247 I. C. C. 399, 401, the order in which was sustained in *Purcell v. United States*, 315 U. S. 384; *Gulf, T. & W. Ry. Co. Abandonment*, 233 I. C. C. 321, 331; *Southern Pac. Co. Abandonment*, 199 I. C. C. 731, 735; *Great Northern Ry. Co. Construction*, 166 I. C. C. 3, 37; *Clarkson Character of Commerce v. Nor. Pac. Ry. Co.*, 160 I. C. C. 752, 759. But we need not give this element any weight here, for this record fully

warrants a certificate of abandonment, without consideration of it.

Upon rehearing evidence regarding the possible extension of the Lenox Avenue subway in New York City was submitted. An engineer of the New York Board of Transportation testified to the following effect: The Board has formulated a project to extend the subway from its present terminus at West 145th Street north to West 155th Street and 8th Avenue. If constructed, this extension would enable passengers to transfer to the present elevated railway which extends from West 155th Street and 8th Avenue eastward to a point on River Street near East 164th Street, where passengers may make connection with the Lexington Avenue subway. Shuttle service is now provided on this elevated line, and one of its stations is at Sedgwick Avenue.³ This project has not, however, progressed beyond the blueprint stage. It is merely one of numerous projects that have been studied by the Board; it has not been adopted, and it is not known whether it will be. Hundreds of such projects have been studied and then shelved.

It seems obvious that the possibility of this extension has so remote a relation to the proposed abandonment of the Yonkers branch that it is entitled to practically no weight. The record shows that there was a steady decline in Yonkers branch patronage for many years prior to the dismantlement of the 6th Avenue and 9th Avenue elevated lines, and that though the retained shuttle enabled Yonkers branch passengers to effect connections with the 8th Avenue subway, the Yonkers branch patronage continued to fall off. These facts indicate that even though the Lenox Avenue extension were built, it would not have the effect of substantially increasing Yonkers branch patronage.

If its application is granted, applicant would dismantle and salvage the Yonkers branch, and it would also dismantle and salvage the electric installations on the Putnam

³ Prior to the dismantlement of the 6th Avenue and 9th Avenue elevated lines in December 1938 and June 1940, respectively, passengers from applicant's Putnam Division and Yonkers branch trains running to Sedgwick Avenue could transfer to the elevated system at Sedgwick Avenue to continue their journeys to downtown New York. When those elevated railways were dismantled, the present shuttle was retained, permitting applicant's passengers to use the shuttle from Sedgwick Avenue to West 155th Street and 8th Avenue and there transfer to the subway.

main line south of Van Cortlandt Park Junction. The Putnam main line would not be otherwise disturbed, and the present steam operations on that division to and from Sedgwick Avenue, including the local or commutation service between Sedgwick Avenue and the several stations on the Putnam Division in Yonkers, would be continued. The application does not seek authority for the removal of the electric installations on the Putnam Division south of Van Cortlandt Park Junction or for the discontinuance over this track of the electric train operations en route to and from the Yonkers branch. No authority from us to make these changes is necessary. The mere removal of the electric installations would not constitute an abandonment of the line. Nor would the partial discontinuance of service over this part of the Putnam Division constitute an abandonment within the meaning of section 1(18) of the act; see *Palmer v. Massachusetts*, 308 U. S. 79, 85; *Public Convenience Application of Kansas City Southern Ry.*, 94 I. C. C. 691; *Morris & Essex R. Co. Proposed Abandonment*, 175 I. C. C. 49, 52. However, in reaching our conclusions herein, we have given consideration to the fact that upon abandonment of the Yonkers branch the applicant would discontinue the train service between Sedgwick Avenue and Getty Square.

A certificate authorizing the proposed abandonment would include by necessary implication the authority to discontinue all service on the branch and dismantle the rails and other facilities. The jurisdiction over abandonments conferred upon us by section 1(18) of the act is exclusive, in view of the provision of section 1(20) that the carrier may, from and after the issuance of our certificate, proceed with the abandonment covered thereby, without securing approval other than such certificate. It follows that our jurisdiction is not affected by reason of the fact that applicant has not secured the consent of the State Commission to discontinue service over the branch or to discontinue the stations on it.

The people of Yonkers virtually deserted this branch, and the applicant ought not to be required to maintain it, at a continuing loss of approximately \$60,000 annually, for the few people who found it somewhat more convenient than available alternate means of transportation. The rehearing discloses nothing to indicate that any substantial increase in business on the Yonkers branch will be experienced in

the future, and we affirm the finding of division 4 in this regard.

We find that present and future public convenience and necessity permit abandonment by the New York Central Railroad Company of the branch of railroad in Bronx and Westchester counties, New York, described herein.

EMPLOYEES.

No employee has been forced out of employment on the applicant's system as a result of the cessation of operation of the branch. Prior thereto four station agents, two enginemen, two conductors and one brakeman (or collector) worked on the branch exclusively, from six to ten engine and train crew employees on the Putnam Division main line worked part time on the branch, and a section crew, consisting of one foreman and usually six men worked on the branch and the portion of the Putnam Division south of Van Cortlandt Park Junction. Our certificate will be issued upon the understanding that we retain jurisdiction for a period of two years from the date hereof to consider the question of imposing conditions for the protection of employees who may have been adversely affected by anything done pursuant to the permission herein granted.

The findings in the report of division 4, except as modified herein, are affirmed.

An appropriate certificate will be issued.

COMMISSIONER ALLBREIDGE, being necessarily absent, did not participate in the consideration and adoption of this report.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 25th day of February, A. D. 1944.

FINANCE, DOCKET No. 13944

NEW YORK CENTRAL RAILROAD COMPANY ABANDONMENT

Investigation of the matters and things involved in this proceeding having been made, and hearing and rehearing having been held, and a report containing our findings of fact and conclusions thereon having on the date hereof been made and filed, which report is hereby referred to and made a part hereof:

It is certified, That the present and future public convenience and necessity permit abandonment by The New York Central Railroad Company of a branch line of railroad in Bronx and Westchester counties, New York, described in the aforesaid report, *provided, however*, and this certificate is issued upon the express understanding, that the Interstate Commerce Commission reserves jurisdiction for a period of two years from the date hereof to consider the question whether conditions should be imposed for the protection of employees who may have been adversely affected by anything done pursuant to the permission to abandon granted herein.

It is ordered, That this certificate shall take effect and be in force from and after 30 days from February 28, 1944.

And it is further ordered, That The New York Central Railroad Company shall report to this Commission as required by valuation order No. 24, effective May 15, 1928.

By the Commission.

(SEAL)

W. P. BARTEL,
Secretary.

SUPREME COURT OF THE UNITED STATES.

No. 109 — OCTOBER TERM, 1943.

City of Yonkers and John W. Tooley,
Jr., as President of Committee of
Yonkers Commuters, Etc., Appel-
lants,

vs.

The United States of America, Inter-
state Commerce Commission and the
New York Central Railroad Com-
pany.

Appeal from the District
Court of the United
States for the Southern
District of New York.

[January 3, 1944.]

Mr. Justice DOUGLAS delivered the opinion of the Court.

The Interstate Commerce Act confers upon the Interstate Commerce Commission authority to issue certificates of public convenience and necessity allowing any carrier subject to the Act to abandon "all or any portion" of its line of railroad. Sec. 1(18), (19), (20), 49 U. S. C. § 1(18), (19), (20), 24 Stat. 379, 41 Stat. 477-478. But the Act also provides that that authority of the Commission "shall not extend" to the abandonment "of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam-railroad system of transportation." Sec. 1(22), 49 U. S. C. § 1(22).

The New York Central Railroad Co. filed an application with the Commission for a certificate under § 1(18)-(20) of the Act authorizing it to abandon an electric branch line extending 3.1 miles from Van Cortlandt Park Junction, New York City, to Getty Square, Yonkers, New York. This line was constructed in 1888 by a predecessor company for the purpose of developing suburban business between Yonkers and New York City. The line was electrified in 1926 with the hope that the suburban business would increase. It is now a physical part of the New York Central's Putnam Division with which it connects at Van Cortlandt Park Junction. The Putnam Division in turn connects with the Hudson Division which is part of the main line of the New York Cen-

tral from New York City to Chicago. The Hudson Division follows the east bank of the Hudson River through Yonkers to Albany. The Putnam Division extends north from Sedgwick Avenue and West 161st Street, New York City, through Yonkers to Brewster, New York. The Putnam Division lies east of, and is roughly parallel with, the Hudson Division. In the City of Yonkers the two divisions are about a mile apart. The electric line in question is between the Hudson and Putnam Divisions. Getty Square, a terminal in Yonkers, is a mile east of the Yonkers station on the Hudson Division. The New York Central system is for the most part operated by steam. Some portions of its lines are electrified, including the Hudson Division between New York City and Harmon, New York, and Harlem Division so far as White Plains, New York, the Putnam Division between Sedgwick Avenue and Van Cortlandt Park Junction, and the Yonkers line in question. With the exception noted, no part of the Putnam Division is electrified, its trains being operated by steam.

This Yonkers electric branch handles no freight, mail, express, or milk traffic and no industries are dependent on it for such service. Its traffic is exclusively passenger traffic, principally commuter travel between Getty Square and three other stations in Yonkers and Grand Central Station in New York City. The trains serving stations on this Yonkers electric branch do not go through to Grand Central Station on account of the congested condition of the main-line tracks funneling into Grand Central Station. Accordingly, these trains run only from Getty Square to Van Cortlandt Park Junction and thence over the main-line of the Putnam Division to the terminal at Sedgwick Avenue. Passengers from Yonkers to Grand Central Station must transfer to Hudson Division trains at either High Bridge or University Heights stations which are north of the Sedgwick Avenue Station. Tariffs of the New York Central provide for one-way, monthly, commutation, and other tickets usable between the stations in Yonkers and Grand Central Station. Time tables of the New York Central disclose the service on this electric branch. And its operating results are reflected in the accounts of the New York Central.

The trains running on this electric branch are composed of two, three or four cars. The trains are hauled not by a locomotive but by so-called multiple unit cars. The structure of the line is such

that locomotives cannot be used on it. The trains on this electric branch proceed only to Getty Square, Yonkers, and not beyond.

The Commission though adverting to a number of the facts which we have mentioned did not address itself to the question whether this electric branch line was or was not "operated as a part or parts of a general steam railroad system of transportation" within the meaning of § 1, 22. The Commission did not undertake to review the evidence relevant to that issue. It made no findings respecting it. It authorized the abandonment on the grounds that continued operation would impose "an undue and unnecessary burden" upon the New York Central and upon interstate commerce.¹ The Commission says that the question of its jurisdiction under § 1, 22, was neither presented *in limine*, nor urged in the briefs, in the exceptions to the examiner's report, or in the oral arguments. It was, however, presented in petitions for reconsideration which the Commission denied without opinion.

This suit to enjoin the order of the Commission, brought before a District Court of three judges (38 Stat. 219, 220, 28 U. S. C. § 47) was initiated by the Public Service Commission of New York, the City of Yonkers, and a committee of Yonkers commuters.² The jurisdiction of the Commission was challenged before the District Court. And that objection which was overruled there (50 F. Supp. 497) has been renewed on the appeal, which brings the case here. 28 U. S. C. § 47a, § 345.

The District Court in sustaining the order of the Commission, reviewed the evidence and concluded that the operation of this electric branch was "intertwined with the operation of the system as a whole." It relied especially on the fact that the bulk of the traffic on this electric branch transfers at High Bridge or University Heights to the Hudson Division and that those transfers made it necessary for the New York Central to provide seats on the Hudson Division trains for all the transferred Yonkers passengers for the remaining short run to Grand Central Station.

¹ The certificate authorizes a complete abandonment of the Yonkers branch, including dismantlement and salvaging.

² The Public Service Commission of New York, which took the lead in attacking the order of the Commission before the District Court but which has not appeared here, asserted in its complaint that authority to discontinue the four stations was required by New York law but had not been sought or obtained.

The Commission itself has noted that in the "construction of these exclusion clauses great difficulty has been experienced, particularly in determining the roads properly classifiable as interurban electric railways." Annual Report (1928), p. 80. That difficulty is apparent here by the division of opinion which exists in the Court whether this Yonkers branch is an "interurban electric" railway which is "operated as a part" of the New York Central system.³ § 1(22). As stated by Mr. Justice Brandeis in *United States v. Idaho*, 298 U. S. 105, 109, the determination of what is included within the exemption of § 1(22) involves a "mixed question of fact and law." Congress has not left that question exclusively to administrative determination; it has given the courts the final say. *Id.*, p. 109. It is settled that the aid of the Commission need not be sought before the jurisdiction of a court is invoked to enjoin violations of the provisions in question. *Texas & Pacific Ry. Co. v. Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266. And the fact that the Commission fails to make a finding on this jurisdictional question obviously does not preclude the reviewing court from making that determination initially. But we deem it essential in cases involving a review of orders of the Commission for the courts to decline to make that determination without the basic jurisdictional findings first having been made by the Commission.

The power of the Commission to control the abandonment of intrastate branches of interstate carriers stems from the power of Congress to protect interstate commerce from undue burdens or discriminations. *Colorado v. United States*, 271 U. S. 153; *Transit Commission v. United States*, 284 U. S. 360; *Purell v. United States*, 315 U. S. 381. And see *United States v. Hubbard*, 266 U. S. 474, for an application of the doctrine of the *Shreveport* case (*Houston, E. & W. T. R. Co. v. United States*, 234 U. S. 342) to the intrastate rates of interurban electric railroads. The exemptions contained in § 1(22) do not necessarily reflect the lack of constitutional power to deal with the excepted phases of railroad enterprise. Underlying § 1(22) is a Congressional policy of reserving exclusively to the states control over that group of

³ Cf. *Piedmont & N. R. Co. v. Interstate Commerce Commission*, 286 U. S. 299, 307, and *United States v. Chicago, N. S. & M. R. Co.*, 288 U. S. 1, 9-12, which emphasize in determining the status of independent electric roads the dominance of interurban passenger service and the preponderance of local traffic.

essentially local activities. See H. Rep. No. 456, 66th Cong., 1st Sess., p. 18. We recently stated that the extension of federal control into these traditional local domains is a "delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions." *Palmer v. Massachusetts*, 308 U. S. 79, 84. In the application of the doctrine of the *Shreveport* case, this Court has required the Commission to show meticulous respect for the interests of the States. It has insisted on a "suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear." *Florida v. United States*, 282 U. S. 194, 211-212. ~~that~~ *In* that case this Court set aside an intrastate rate order of the Commission because of the "lack of the basic or essential findings required to support the Commission's order." *Id.*, p. 215. The principle of the *Florida* case is applicable here. The question is not merely one of elaborating the grounds of decision and bringing into focus what is vague and obscure. See *United States v. Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499. Cf. *Securities & Exchange Commission v. Chenery Corp.*, 318 U. S. 80. Here as in the *Florida* case the problem is whether the courts should supply the requisite jurisdictional findings which the Commission did not make and to which it even failed to make any reference.⁴

Congress has withheld from the Commission any power to authorize abandonment of certain types of railroad lines. It is hardly enough to say that the Commission's orders may be set aside by the courts where the Commission exceeds its authority. The Commission⁵ has a special competence to deal with the transportation problems which are reflected in these questions. The Congress has entrusted to the Commission the initial responsibility for determining through application of the statutory standards

⁴ For cases dealing with the exception of suburban or interurban electric railways where the Commission has passed on the jurisdictional question see In the Matter of Michigan United Rys. Co., 67 I. C. C. 452; Abandonment of Line by Boise Valley Traction Co., 79 I. C. C. 167; Proposed Abandonment by Lewiston & Youngstown Frontier Ry. Co., 124 I. C. C. 219; Construction by Piedmont & Northern Ry. Co., 138 I. C. C. 363, 372; Unified Operation at Los Angeles Harbor, 150 I. C. C. 649, 661; Glendale & Montrose Ry. Proposed Abandonment, 166 I. C. C. 625.

⁵ The requisite finding was made by the Commission in the Oregon Short Line case (193 I. C. C. 697, 705) in which the order of the Commission was set aside by *United States v. Idaho*, *supra*.

the appropriate line between the federal and state domains. Proper regard for the rightful concern of local interests in the management of local transportation facilities makes desirable the requirement that federal power be exercised only where the statutory authority affirmatively appears. The sacrifice of these legitimate local interests may be as readily achieved through the Commission's oversight or neglect (*Illinois Commerce Commission v. Thomson*, 318 U. S. 675), as by improper findings. The insistence that the Commission make these jurisdictional findings before it undertakes to act not only gives added assurance that the local interests for which Congress expressed its solicitude will be safeguarded. It also gives to the reviewing courts the assistance of an expert judgment on a knotty phase of a technical subject.

We are asked to presume that the Commission, knowing the limit of its authority, considered this jurisdictional question and decided to act because of its conviction that this branch line was not exempt by reason of § 1(22). But that is to deal too cavalierly with the Congressional mandate and with the local interests which are pressing for recognition. Where a federal agency is authorized to invoke an overriding federal power except in certain prescribed situations and then to leave the problem to traditional state control, the existence of federal authority to act should appear affirmatively and not rest on inference alone.

This is not to insist on formalities and to burden the administrative process with ritualistic requirements. It entails a matter of great substance. It requires the Commission to heed the mandates of the Act and to make the expert determinations which are conditions precedent to its authority to act.

We intimate no opinion on the merits of the controversy. In absence of the requisite jurisdictional findings we think the order of the Commission should have been set aside.

Reversed.

SUPREME COURT OF THE UNITED STATES.

No. 109.—OCTOBER TERM, 1943.

City of Yonkers and John W. Tooley,
Jr., as President of Committee of
Yonkers Commuters, Etc., Appel-
lants,

vs.

The United States of America, Inter-
state Commerce Commission and the
New York Central Railroad Com-
pany.

Appeal from the District
Court of the United
States for the Southern
District of New York.

[January 3, 1944.]

Mr. Justice FRANKFURTER, dissenting.

Congress has empowered the Interstate Commerce Commission to authorize a railroad, when public convenience permits, to abandon any portion of its line. But when such portion is a suburban or interurban electric railway, abandonment may be authorized only if it is part of a general steam railroad system of transportation. Section 1 (18) and (22) of the Interstate Commerce Act, as amended, 49 U. S. C. § 1 (18) and (22). This Court has held that whether such a line is of a character to permit abandonment under federal authority need not be determined in the first instance by the Interstate Commerce Commission; and such determination when made does not foreclose an independent judicial judgment. *Texas & Pac. Ry. v. Gulf, etc. Ry.*, 270 U. S. 266, and *United States v. Gilcho*, 298 U. S. 105. On such an independent examination of the issue the court below had no doubt that the Yonkers branch of the New York Central, the portion of the Central lines for which abandonment was here sought, was not "a suburban or interurban line unconnected with the rest of the Central's railroad system" but was in fact "intertwined with the operation of the [New York Central Railroad] system as a whole". 50 F. Supp. 497, 498. The record amply sustains this conclusion. If this Court, however, on its own estimate of the various elements in the financial, physical

and transportation relations between the rest of the New York Central lines and this Yonkers branch, had struck a contrary balance and found that the Yonkers branch was not operated as a part of the general New York Central system, I should not have deemed the matter of sufficient importance to warrant expression of dissent.

But the Court does not decide on the merits. In effect, it remits the controversy to the Interstate Commerce Commission on the ground that the Commission did not make a formal finding, described as "jurisdictional", that the Yonkers branch was in fact "operated as a part . . . of a general steam railroad system of transportation". The Commission may very well now formally make such a finding of a connection between the Yonkers branch and the New York Central, which in fact is writ large in the Commission's report in granting the application for abandonment, and the weary round of litigation may be repeated to the futile end of having this Court then, forsooth, express an opinion on the merits opposed to that of the Commission and the District Court. This danger if not likelihood of thus marching the king's men up the hill and then marching them down again seems to me a mode of judicial administration to which I cannot yield concurrence. I think the case should be disposed of on the merits by affirming the judgment of the District Court.

This seems to me all the more called for since I find no defect in the foundation of the Commission's order. No doubt the Interstate Commerce Commission like other administrative agencies should keep within legal bounds and courts should keep them there, in so far as Congress has entrusted them with judicial review over administrative acts. Of course when a statute makes indispensable "an express finding", an express finding is imperative, see *Wichita R. R. v. Pub. Util. Comm.*, 260 U. S. 48, 59. But the history of the Interstate Commerce Act and its amendments illumine the different legal functions expressed by the term findings. When Congress exacts from the Commission formal findings there is an end to the matter. For certain duties of the Commission and at certain stages in the history of the Interstate Commerce Act, Congress did require formal findings, but experience led Congress later to dispense with such formal requirements. See *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, 489-90. But courts have also spoken of the need of findings as the basis of

validity of an order by the Interstate Commerce Commission in the absence of a Congressional direction for findings. The requirement of findings in such a context is merely part of the need for courts to know what it is that the Commission has really determined in order that they may know what to review. "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." See *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 509-511.

• This is the real ground for the decisions which have found Interstate Commerce Commission orders wanting in necessary findings. They have all been cases where the determination of an issue is not open to independent judgment by this Court, and where the case as it came here rested on conflicting inferences of fact left unresolved by the Commission. Such were the circumstances, for instance, in *Florida v. United States*, 282 U. S. 194, particularly at 214-215, and *United States v. B. & O. R. Co.*, 293 U. S. 454, 455, particularly at 463-464. Findings in this sense is a way of describing the duty of the Commission to decide issues actually in controversy before it. Analysis is not furthered by speaking of such findings as "jurisdictional" and not even when—to adapt a famous phrase—jurisdictional is softened by a quasi. "Jurisdiction" competes with "right" as one of the most deceptive of legal pitfalls. The opinions in *Crowell v. Benson*, 285 U. S. 22, and the casuistries to which they have given rise bear unedifying testimony of the morass into which one is led in working out problems of judicial review over administrative decisions by loose talk about jurisdiction.

The nub of the matter regarding the requirement of findings, when the formal making of them is not legislatively commanded, is indicated in *United States v. Louisiana*, 290 U. S. 70. Reviewing the validity of the Commission's order is the serious business of sitting in judgment upon a tribunal of great traditions and large responsibility. An order of the Commission should not be viewed in a hypercritical spirit nor even as though *dequantia juris* were our concern. We should judge a challenged order of the Commission by "the report, read as a whole," 290 U. S. *supra* at 80, and by the record as a whole out of which the report arose.

Viewing its order in this light makes plain enough why the Commission never formally stated that the line which it authorized to be abandoned was in fact operated as part of the New York Cen-

tral system. It never formally made this statement because it was never questioned before it. On the face of the application, in the report proposed by the Commissioner's examiner, and in the report of the Commission, by Division 4, authorizing the issuance of a certificate of abandonment, the facts showing that the Yonkers branch was a part of the operating system of the New York Central are set forth in detail. Extensive exceptions were taken to the examiner's report by the City of Yonkers and a committee of Yonkers commuters but not even remotely did they take the point which is now made the ground for invalidating the Commission's order. Elaborate petitions for rehearing were filed by the protestants, including the Public Service Commission of New York, as the guardian of the local interests of New York,¹ but not one of these petitions raised the objection now raised. The jurisdiction of the Commission was questioned, but no claim was made that the Yonkers branch was not an operating part of the New York Central. The City of Yonkers enumerated four grounds in challenging the jurisdiction of the Commission, but it did not specify the one now taken by the Court. The committee of commuters rested their claim of want of jurisdiction on the specific grounds that "(1) the line sought to be abandoned is an interurban electric passenger railway located wholly within the State of New York and (2) . . . the alleged annual operating deficit" of the Yonkers branch was too insignificant to burden the operation of the New York Central. Exercising the discretion which Congress explicitly conferred upon it, the full Commission denied the petition for rehearing. Interstate Commerce Act, § 17(6). In any fair construction of the action of the Commission such a denial is an adverse finding of such claims as were made in the petitions for rehearing. The crucial fact is that only when the present bill was filed in the court below did the objection which the Court now

¹ Due concern for local interests in the administration of the Interstate Commerce Act hardly calls for an exaggerated concern for formal findings. The Interstate Commerce Act relies primarily on state authorities for the safeguarding of local interests. It is therefore relevant to note that the New York Public Service Commission, which is charged with the duty of protecting the local interests of New York against federal encroachments and which does not appear to have been unalert in doing so, has acquiesced in the decision below and is not here urging the local interest on which the decision of this Court seems to be based. That the state agency had best be looked to for the vindication of conflicting local interests within a state is well illustrated by the fact that while the City of Yonkers protested against the abandonment of the branch line, the City of New York urged it.

sustains emerge in the specific claim that the Yonkers "branch is not operated as a part or parts of a general steam railroad system of transportation."

Can there be any doubt that this contention was not put to the Commission because it was an afterthought? This issue was never tendered to the Commission because the facts which deny it were never questioned in the proceedings conducted before it with vigor and ability by several protestants during the three successive stages that preceded a challenge in the courts.

The case is now sent back to the Commission. The facts regarding the relation of the Yonkers branch to the New York Central are spread at large upon the record and are not in controversy. In view of the three proceedings before the Commission it is reasonable to assume that the Commission will add to its report the formal finding now requested of it. If the case then returns here I find it too hard to believe that this Court would reject the conclusion of the Commission and of the lower court that the Yonkers branch is an operating part of the New York Central within § 1(22). Is not insistence on such an empty formalism a reversion to seventeenth century pleading which required talismanic phrases, as for instance that a seller could not be held to warrant that he sold what he purported to sell unless the buyer pleaded *warrantizanda vendidit* or *bargainizasset*? On the other hand, if the Court with all the facts before it does not think the Yonkers branch is a part of the railway operations of the New York Central, now is the time to say so.

Mr. Justice REED and Mr. Justice JACKSON join in this opinion.